

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

LARRY G. PHILPOT,

Plaintiff

V.

**DRC MEDIA, LLC d/b/a FORT WORTH
BUSINESS PRESS**

Defendant.

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Civil Action No. 4:18-cv-331

PLAINTIFF’S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff Larry G. Philpot (“Philpot” or “Plaintiff”) files this Original Complaint against DRC Media, LLC d/b/a Fort Worth Business Press (“DRC Media” or “Defendant”) on personal knowledge as to all facts regarding himself and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

Photographers create pieces that extend well beyond the four corners of the photograph to evoke sentiments within the viewer so that the viewer is a part of the moment captured in time. For concert photographers, the odds are almost always against them—the musicians are constantly moving, the lighting is usually dark and typically changing, and it is practically impossible to secure a good vantage point. But every now and then, a photographer is able to get a great shot, the kind of iconic shot that does exactly what photographs are supposed to do, make the viewer a part of that very moment in time.

Larry Philpot, an experienced freelance photographer, created an iconic photograph of Willie Nelson, capturing a moment in time with the artist amidst the turbulence of a music concert. These photographs are the type of career-making works that can launch a successful photography career. Philpot offered the photographs under a Creative Commons license, permitting members of the public to use the photos provided that the photos are properly attributed to Philpot.

Defendant DRC Media copied and posted Philpot's photograph of Willie Nelson onto DRC Media's website, <http://www.fortworthbusiness.com>, as DRC Media's own. DRC Media did not attribute the photographs to Philpot, thereby infringing on Philpot's copyrighted work. In freelance photography, the reputation and licensing revenue guarded by copyright law are a photographer's sole means to support their career. DRC Media stole both of those from Philpot. Larry Philpot brings this action to protect not just his rights under copyright law, but also his livelihood as a photographer.

II.

PARTIES

A. Plaintiff

1. Plaintiff Larry G. Philpot is a citizen and resident of the State of Indiana. Philpot is a renowned freelance photographer who specializes in photographing concerts and musical performances across the United States.

B. Defendant

2. Defendant DRC Media, LLC d/b/a Fort Worth Business Press is a Texas corporation with its principal place of business in Fort Worth that may be served via its registered agent, Richard L. Connor, at 3509 Hulen Street, Suite 201, Fort Worth, Texas 76107 or wherever he may be found.

III.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this civil action presents a federal question as Plaintiff presents a civil claim arising under the Constitution, laws, or treaties of the United States.

4. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) because this civil action arises under an Act of Congress relating to copyrights, namely the Copyright Act of the United States, 17 U.S.C. § 101, et seq.

5. This Court has personal jurisdiction over DRC Media, LLC d/b/a Fort Worth Business Press because DRC Media, LLC d/b/a Fort Worth Business Press is a Texas limited liability company and because its principal place of business is in the State of Texas.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Defendant DRC Media, LLC d/b/a Fort Worth Business Press resides and may be found in this District.

IV.

FACTUAL BACKGROUND

A. The Highly Competitive World of Freelance Concert Photography

7. To say that concert photography is a tough business is a severe understatement. Before having the opportunity to even take a photo, concert photographers must invest in expensive equipment and negotiate to obtain access to the concert stage. At the concert, they must battle all the variables that arise from an uncontrolled setting—a rowdy crowd, horrible lighting that is always changing, and musicians constantly moving. Not to mention, it is really loud. As a result, despite all of their efforts and hard work, concert photographers often take photographs that are entirely unusable, where the rock stars appear as blurs and washy blobs.

8. Financially, it can be difficult to maintain a steady income stream from concert photography. Freelance concert photographers only earn money when they license or sell their work product. If the photographs are unusable, which is often the case, or simply aren't good, then the photographers do not receive any type of payment.

9. And, in today's technological age where anyone with a smart phone can take pictures at concerts, concert photography is becoming significantly more competitive, making it even more imperative to capture the perfect shot. Because that is all that there is demand for—a few once-in-a-lifetime shots for each star. It doesn't matter if a concert photographer takes 100 good shots of a star at a concert—an article about Willie Nelson, for example, only needs one picture of Willie Nelson—the best one.

10. In such a competitive environment, it is essential that concert photographers receive the compensation and credit to which they are entitled, but also need to advance their career.

B. Larry Philpot: A Professional Concert Photographer

11. Larry Philpot is a renowned freelance photographer who specializes in taking photographs of musicians at concerts and other performances. Philpot has invested thousands of dollars in equipment and has spent years perfecting his craft. He has established a strong reputation for himself and his work, and due to his professional reputation, he often obtains privileged access to take photographs of musical performers at concerts.

12. Philpot's reputation as a premier photographer is critical to his business. The more his photographs are viewed with proper attribution provided to him, the more access he can obtain to take celebrity photographs, and the more he can command in licensing fees.

13. Philpot regularly licenses his photographs to end customers, including such publications and entities as Rolling Stone, Forbes, Gannett, AXS-TV, iHeart, Cummulus Media,

Hearst, PBS, NPR, AOL Music, Berkshire Hathaway—it is how he earns his living and expands his business. Philpot has also licensed his photographs to premier musicians, including Willie Nelson, Foreigner, KISS, John Mellencamp, Kid Rock, and Heart.

C. Philpot Creates the Willie Nelson Photograph

14. On October 4, 2009, Philpot created a photograph of Willie Nelson in St. Louis, Missouri (the “Willie Nelson Photo”). A copy of the Willie Nelson Photo is attached as Exhibit A.

15. The Willie Nelson Photo is an original work that Philpot registered with the United States Copyright Office as part of a collection of photographs on September 5, 2012. The Willie Nelson Photo is registered with the United States Copyright Office under Certificate Number VAu 1-132-411. A copy of the copyright registration certificate for the Willie Nelson Photo is attached as Exhibit B.

16. Philpot first displayed the Willie Nelson Photo on May 31, 2011 on the Wikimedia website.

17. The Willie Nelson Photo has become one of the most widely-viewed pictures of Willie Nelson.

D. The Creative Commons License

18. A Creative Commons license is a simple, standardized copyright license that anyone can use to license their work. The copyright holder designates their work as governed by a Creative Commons license, and anyone may use the work provided they adhere to the terms of the license.

19. In an effort to market his freelance photography practice, Philpot offered the Willie Nelson Photo through Wikimedia for distribution, public display, and public digital

performance under a Creative Commons Attribution 2.0 Generic license (abbreviated as “CC BY 2.0”). A copy of the CC BY 2.0 license is attached as Exhibit C.

20. This license allows anyone to use the work, provided that they, among other requirements:

- a. Include a copy of the Uniform Resource Identifier for the CC BY 2.0;
- b. Provide attribution to the author of the work; and
- c. Provide the Uniform Resource Identifier that the licensor specifies to be included with the work.

E. Restrictions on the Willie Nelson Photo

21. At the Wikimedia website, Larry Philpot provided the following description for the Willie Nelson Photo, “Willie Nelson getting ready to perform. Farm Aid 2009. Photo by Larry Philpot, www.soundstagephotography.com.” Philpot also provided the following requirement for the Willie Nelson Photo: “You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).”

22. Additionally, the Willie Nelson Photo contains specific metadata identifying Larry Philpot as the creator and that the work is copyrighted:



F. DRC Media Infringes Philpot's Copyright in the Willie Nelson Photo.

23. DRC Media owns and operates the website located at <http://www.fortworthbusiness.com>.

24. DRC Media uses the websites located at <http://www.fortworthbusiness.com> for financial gain by selling advertising to third parties.

25. The website located <http://www.fortworthbusiness.com> contained the following notation, "Copyright 2018 Fortworthbusiness.com."

26. DRC Media infringed Philpot's copyright in the Willie Nelson Photo by publishing the Willie Nelson Photo on the <http://www.fortworthbusiness.com> website at http://www.fortworthbusiness.com/news/library-honoring-willie-nelson-with-us-pop-music-prize/article_e28ab294-263e-11e5-a71f-8392df6b87a3.html and <https://bloximages.chicago2.vip.townnews.com/fortworthbusiness.com/content/tncms/assets/v3/editorial/6/c1/6c1878fc-263f-11e5-925c-cf06a57de58e/559e7912792f1.image.jpg>. A copy of these webpages as they appeared with the Willie Nelson Photo is attached as Exhibit D.

27. DRC Media did not provide attribution to Philpot when DRC Media published the Willie Nelson Photo.

28. DRC Media did not list or link to Philpot's website, soundstagephotography.com, when DRC Media published the Willie Nelson Photo.

29. Additionally, DRC Media removed the metadata from the Willie Nelson Photo that identified Larry Philpot as the creator and that the image is copyrighted.

G. The Damage Done

30. DRC Media passed off Philpot's Willie Nelson Photo as DRC Media's own, ignoring Philpot's primary requirement under the Creative Commons license to allow DRC

Media to use his copyrighted work—the credit. Philpot has been deprived of the credit for taking the exceptional Willie Nelson Photo.

31. Additionally, DRC Media removed the metadata from the Willie Nelson Photo, thereby creating the impression that the Willie Nelson Photo is in the public domain and exposing them to further copying by third parties without any notice that the image is copyrighted by Philpot.

V.

CLAIMS

A. Count One: Copyright Infringement

32. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

33. DRC Media operates and operated the website located at <http://www.fortworthbusiness.com>.

34. DRC Media published the Willie Nelson Photo at http://www.fortworthbusiness.com/news/library-honoring-willie-nelson-with-us-pop-music-prize/article_e28ab294-263e-11e5-a71f-8392df6b87a3.html.

35. DRC Media published the Willie Nelson Photo at <https://bloximages.chicago2.vip.townnews.com/fortworthbusiness.com/content/tncms/assets/v3/editorial/6/c1/6c1878fc-263f-11e5-925c-cf06a57de58e/559e7912792f1.image.jpg>.

36. DRC Media's acts are and were performed without the permission, license, or consent of Plaintiff.

37. DRC Media acted with willful disregard of the laws protecting Plaintiff's copyrights.

38. DRC Media infringed Plaintiff's copyrights in the Willie Nelson Photo in violation of 17 U.S.C. § 501.

39. Plaintiff has sustained and will continue to sustain substantial damage in an amount not yet fully ascertainable, including but not limited to damage to his business reputation and goodwill.

40. Plaintiff is informed and believes and thereon alleges that the DRC Media has obtained profits recoverable under 17 U.S.C. § 504. Plaintiff will require an accounting from the DRC Media of all monies generated from the Willie Nelson Photo.

41. In the alternative and at his election, Plaintiff is entitled to seek maximum statutory damages for each separate act of willful infringement by DRC Media in an amount of \$150,000 per each infringement.

42. Plaintiff has suffered and continues to suffer irreparable harm and damage as a result of the above-described acts. Accordingly, Plaintiff seeks permanent injunctive relief pursuant to 17 U.S.C. § 502, as well as seizure of the Willie Nelson Photo.

43. Plaintiff is entitled to recover from the DRC Media his attorney's fees and costs of suit, pursuant to 17 U.S.C. § 505.

B. Count Two: Removal of Copyright Management Information

44. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

45. DRC Media, without Plaintiff's knowledge, permission, or authorization, intentionally removed and/or altered copyright management information for the Willie Nelson Photo by removing the metadata for the Willie Nelson Photo that contained Plaintiff's name as the creator of, and the identification that the Willie Nelson Photo was copyrighted, in violation of 17 U.S.C. § 1202(b)(1).

46. DRC Media, without Plaintiff's knowledge, permission, or authorization thereafter distributed the Willie Nelson Photo having reasonable grounds to know that such acts will induce, enable, facilitate, or conceal an infringement of copyright in violation of 17 U.S.C. §1202 (b)(2) and (3).

47. DRC Media's removal or alteration of copyright management information from the Willie Nelson Photo was and is willful and intentional and was and is executed with full knowledge of Plaintiff's rights under Copyright Law, and in disregard of those rights.

48. Plaintiff is entitled under 17 U.S.C. § 1203(b)(1) to the entry of permanent injunctive relief to prevent or restrain DRC Media from removing Plaintiff's copyright management information or distributing Plaintiff's copyrighted works knowing that such copyrighted information has been unlawfully removed.

49. Plaintiff is entitled to recover his actual damages suffered as a result of the violation and any profits of DRC Media attributable to the violation and not taken into account in computing actual damages, or, at Plaintiff's election, statutory damages pursuant to 17 U.S.C. § 1203(c).

50. Plaintiff is entitled to recover costs and attorney's fees from DRC Media pursuant to 17 U.S.C. § 1203(b)(4) and (5).

VI.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

VII.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands that judgment be entered against DRC Media as follows:

1. DRC Media, DRC Media's agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with DRC Media, be permanently enjoined from directly or indirectly infringing Plaintiff's copyrights in any manner, including generally, but not limited to reproducing, distributing, displaying, performing or making derivatives of any of the Willie Nelson Photo;

2. DRC Media, DRC Media's agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with DRC Media, be permanently enjoined from directly or indirectly removing or altering Plaintiff's copyright management information from any work and from distributing any of Plaintiff's works with removed or altered copyright management information;

3. That DRC Media be ordered to:

- a. Retrieve, to the extent possible, all copies of the Willie Nelson Photo;
- b. Inform all recipients of the Willie Nelson Photo of Plaintiff's ownership;
- c. Inform all recipients of the Willie Nelson Photo that DRC Media was not authorized to reproduce, distribute, display, perform, or make derivatives of the Willie Nelson Photo;

4. DRC Media be required to pay actual damages, statutory damages, and disgorgement of all profits derived by DRC Media from DRC Media's acts of copyright infringement and removal of copyright management information;

5. DRC Media be required to pay Plaintiff the costs of this action, prejudgment interest, and reasonable attorney's fees; and

6. Plaintiff be granted all other and further relief to which he is entitled.

Dated: May 2, 2018

Respectfully submitted,

HUTCHERSON LAW PLLC

/s/ Kenton J. Hutcherson

Kenton J. Hutcherson

Texas State Bar No. 24050798

Hutcherson Law PLLC

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Dallas, Texas 75204

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Fax: (214) 443-4210

Email: kjh@hutchersonlaw.com

ATTORNEY FOR PLAINTIFF

EXHIBIT A



EXHIBIT B



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Register of Copyrights, United States of America

Registration Number
VAu 1-132-411

Effective date of
registration:

September 5, 2012

Title

Title of Work: 2009 Musician Photos

Contents Titles: 2009 Musician Photos

Completion/Publication

Year of Completion: 2009

Nation of 1st Publication: United States

Author

■ **Author:** Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

Copyright claimant

Copyright Claimant: Larry Gene Philpot

12527 Winding Creek Lane, Indianapolis, IN, 46236

Rights and Permissions

Name: Larry Philpot

Email: larrygphilpot@gmail.com

Telephone: 317-567-1338

Address: 12527 Winding Creek Lane

Indianapolis, IN 46236 United States

Certification

Name: Larry G. Philpot

Date: September 5, 2012



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EXHIBIT C

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EXHIBIT D

www.fortworthbusiness.com/news/library-honoring-willie-nelson-with-us-pop-music-prize/article_e28ab294-263e-11e5-a71f-8392df6b87a3.html


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TOP STORY

Library honoring Willie Nelson with US pop music prize

BRETT ZONGKER, Associated Press Jul 9, 2015 0



Source: Wikipedia


The Library of Congress will honor Willie Nelson with its Gershwin Prize for Popular Song.

f t e B Q

BRETT ZONGKER, Associated Press

WASHINGTON (AP) — Willie Nelson will receive the national library's pop music prize this year — the Gershwin Prize for Popular Song — as the Library of Congress cited Nelson's six decades in music Thursday.

Nelson will receive the prize in November when he will be feted with a concert and other honors in Washington, the library said.



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